

## LEGISLATIVE BILL 391

Approved by the Governor April 17, 2002

Introduced by Jensen, 20; Aguilar, 35; Quandahl, 31; Schimek, 27; Vrtiska, 1

AN ACT relating to public school buildings; to adopt the Nebraska Schools Construction Alternatives Act.

Be it enacted by the people of the State of Nebraska,

Section 1. This act shall be known and may be cited as the Nebraska Schools Construction Alternatives Act.

Sec. 2. The purpose of the Nebraska Schools Construction Alternatives Act is to authorize a school district to enter into a design-build contract which is subject to qualification-based selection or a construction management at risk contract for a public project if the school district adheres to the procedures set forth in the act.

Sec. 3. For purposes of the Nebraska Schools Construction Alternatives Act:

(1) Construction management at risk contract means a contract by which a construction manager (a) assumes the legal responsibility to deliver a construction project within a contracted price to the school district, (b) acts as a construction consultant to the school district during the design development phase of the project when the school district's architect or engineer designs the project, and (c) is the builder during the construction phase of the project;

(2) Construction manager means the legal entity which proposes to enter into a construction management at risk contract pursuant to the act;

(3) Design-build contract means a contract which is subject to qualification-based selection between a school district and a design-builder to furnish (a) architectural, engineering, and related design services for a project pursuant to the act and (b) labor, materials, supplies, equipment, and construction services for a project pursuant to the act;

(4) Design-builder means the legal entity which proposes to enter into a design-build contract which is subject to qualification-based selection pursuant to the act;

(5) Letter of interest means a statement indicating interest to enter into a design-build contract or a construction management at risk contract for a project pursuant to the act;

(6) Performance-criteria developer means any person licensed or any organization issued a certificate of authorization to practice architecture or engineering pursuant to the Engineers and Architects Regulation Act who is selected by a school district to assist the school district in the development of project performance criteria, requests for proposals, evaluation of proposals, evaluation of the construction under a design-build contract to determine adherence to the performance criteria, and any additional services requested by the school district to represent its interests in relation to a project;

(7) Project performance criteria means the performance requirements of the project suitable to allow the design-builder to make a proposal. Performance requirements include the following, if required by the project: Capacity, durability, standards, ingress and egress requirements, description of the site, surveys, soil and environmental information concerning the site, interior space requirements, material quality standards, design and construction schedules, site development requirements, provisions for utilities, storm water retention and disposal, parking requirements, applicable governmental code requirements, and other criteria for the intended use of the project;

(8) Proposal means an offer in response to a request for proposals (a) by a design-builder to enter into a design-build contract for a project pursuant to the act or (b) by a construction manager to enter into a construction management at risk contract for a project pursuant to the act;

(9) Qualification-based selection process means a process of selecting a design-builder based first on the qualifications of the design-builder and then on the design-builder's proposed approach to the design and construction of the project;

(10) Request for letters of interest means the documentation or publication by which a school district solicits letters of interest;

(11) Request for proposals means the documentation by which a school district solicits proposals; and

(12) School district means any school district classified under

section 79-102.

Sec. 4. (1) Notwithstanding the procedures for public lettings in sections 73-101 to 73-106 or any other statute relating to the letting of bids by a political subdivision, a school district which follows the Nebraska Schools Construction Alternatives Act may solicit and execute a design-build contract or a construction management at risk contract.

(2) The school board shall adopt a resolution selecting the design-build contract or construction management at risk contract delivery system provided under the act prior to proceeding with the provisions of sections 5 to 15 of this act. The resolution shall require the affirmative vote of at least seventy-five percent of the school board.

Sec. 5. The school district shall adopt policies for entering into a design-build contract or construction management at risk contract. The policies shall require that such contracts include the following:

(1) Procedures for selecting and hiring on its behalf a performance-criteria developer when soliciting and executing a design-build contract. The procedures shall be consistent with the Nebraska Consultants' Competitive Negotiation Act and shall provide that the performance-criteria developer (a) is ineligible to be included as a provider of any services in a proposal for the project on which it has acted as performance-criteria developer and (b) is not employed by or does not have a financial or other interest in a design-builder or construction manager who will submit a proposal;

(2) Procedures for the preparation and content of requests for proposals;

(3) Procedures and standards to be used to prequalify design-builders and construction managers. The procedures and standards shall provide that the school district will evaluate prospective design-builders and construction managers based on the information submitted to the school district in response to a request for letters of interest and will select design-builders or construction managers who are prequalified and consequently eligible to respond to the request for proposals;

(4) Procedures for preparing and submitting proposals;

(5) Procedures for evaluating proposals in accordance with sections 8, 10, and 11 of this act;

(6) Procedures for negotiations between the school district and the design-builders or construction managers submitting proposals prior to the acceptance of a proposal if any such negotiations are contemplated;

(7) Procedures for filing and acting on formal protests relating to the solicitation or execution of design-build contracts or construction management at risk contracts; and

(8) Procedures for the evaluation of construction under a design-build contract by the performance-criteria developer to determine adherence to the performance criteria.

Sec. 6. (1) A school district shall prepare a request for letters of interest for design-build proposals and shall prequalify design-builders in accordance with this section. The request for letters of interest shall describe the project in sufficient detail to permit a design-builder to submit a letter of interest.

(2) The request for letters of interest shall be (a) published in a newspaper of general circulation within the school district at least thirty days prior to the deadline for receiving letters of interest and (b) sent by first-class mail to any design-builder upon request.

(3) Letters of interest shall be reviewed by the school district in consultation with the performance-criteria developer. The school district shall select prospective design-builders in accordance with the procedures and standards adopted by the school district pursuant to section 5 of this act. The school district shall select at least three prospective design-builders, except that if only two design-builders have submitted letters of interest, the school district shall select at least two prospective design-builders. The selected design-builders shall then be considered prequalified and eligible to receive requests for proposals.

Sec. 7. A school district shall prepare a request for proposals for each design-build contract in accordance with this section. Notice of the request for proposals shall be published in a newspaper of general circulation within the school district and filed with the State Department of Education at least thirty days prior to the deadline for receiving and opening proposals. The request for proposals shall contain, at a minimum, the following elements:

(1) The identity of the school district for which the project will be built and the school district that will execute the design-build contract;

(2) Policies adopted by the school district in accordance with section 5 of this act;

(3) The proposed terms and conditions of the design-build contract, including any terms and conditions which are subject to further negotiation. The proposed general terms and conditions shall be consistent with nationally recognized model general terms and conditions which are standard in the design and construction industry in Nebraska. The proposed terms and conditions may set forth an initial determination of the manner by which the design-builder selects any subcontractor and may require that any work subcontracted be awarded by competitive bidding;

(4) A project statement which contains information about the scope and nature of the project;

(5) Project performance criteria;

(6) Budget parameters for the project;

(7) Any bonds and insurance required by law or as may be additionally required by the school district;

(8) The criteria for evaluation of proposals and the relative weight of each criterion;

(9) A requirement that the design-builder provide a written statement of the design-builder's proposed approach to the design and construction of the project, which may include graphic materials illustrating the proposed approach to design and construction but shall not include price proposals;

(10) A requirement that the design-builder agree to the following conditions:

(a) An architect or engineer licensed to practice in Nebraska will participate substantially in those aspects of the offering which involve architectural or engineering services;

(b) At the time of the design-build offering, the design-builder will furnish to the school board a written statement identifying the architect or engineer who will perform the architectural or engineering work for the design-build project;

(c) The architect or engineer engaged by the design-builder to perform the architectural or engineering work with respect to the design-build project will have direct supervision of such work and may not be removed by the design-builder prior to the completion of the project without the written consent of the school board;

(d) A design-builder offering design-build services with its own employees who are design professionals licensed to practice in Nebraska will (i) comply with the Engineers and Architects Regulation Act by procuring a certificate of authorization to practice architecture or engineering and (ii) submit proof of sufficient professional liability insurance; and

(e) The rendering of architectural or engineering services by a licensed architect or engineer employed by the design-builder will conform to the Engineers and Architects Regulation Act and rules and regulations adopted under the act; and

(11) Other information which the school district chooses to require.

Sec. 8. (1) A school district shall evaluate proposals for a design-build contract in accordance with this section.

(2) The request for proposals shall be sent only to the prequalified design-builders selected pursuant to section 6 of this act.

(3) Design-builders shall submit proposals as required by the request for proposals. The school district may only proceed to negotiate and enter into a design-build contract if there are at least two proposals from prequalified design-builders.

(4) Proposals shall be sealed and shall not be opened until expiration of the time established for making proposals as set forth in the request for proposals.

(5) Proposals may be withdrawn at any time prior to acceptance. The school district shall have the right to reject any and all proposals except for the purpose of evading the provisions and policies of the Nebraska Schools Construction Alternatives Act. The school district may thereafter solicit new proposals using the same or a different project performance criteria.

(6) The school district shall rank in order of preference the design-builders pursuant to the criteria in the request for proposals and taking into consideration the recommendation of the selection committee pursuant to section 11 of this act.

(7) The school district may attempt to negotiate a design-build contract with the highest ranked design-builder selected by the school district and may enter into a design-build contract after negotiations. The negotiations shall include a final determination of the manner by which the design-builder selects a subcontractor. If the school district is unable to negotiate a satisfactory design-build contract with the highest ranked design-builder, the school district may terminate negotiations with that

design-builder. The school district may then undertake negotiations with the second highest ranked design-builder and may enter into a design-build contract after negotiations. If the school district is unable to negotiate a satisfactory contract with the second highest ranked design-builder, the school district may undertake negotiations with the third highest ranked design-builder, if any, and may enter into a design-build contract after negotiations.

(8) The school district shall file a copy of all design-build contract documents with the State Department of Education within thirty days after their full execution. Within thirty days after completion of the project, the design-builder shall file a copy of all contract modifications and change orders with the department.

(9) If the school district is unable to negotiate a satisfactory contract with any of the ranked design-builders, the school district may either revise the request for proposals and solicit new proposals or cancel the design-build process under the act.

Sec. 9. A school district shall prepare a request for proposals for each construction management at risk contract in accordance with this section. At least thirty days prior to the deadline for receiving and opening proposals, notice of the request for proposals shall be published in a newspaper of general circulation within the school district and filed with the State Department of Education. The request for proposals shall contain, at a minimum, the following elements:

(1) The identity of the school district for which the project will be built and the school district that will execute the contract;

(2) Policies adopted by the school district in accordance with section 5 of this act;

(3) The proposed terms and conditions of the contract, including any terms and conditions which are subject to further negotiation. The proposed general terms and conditions shall be consistent with nationally recognized model general terms and conditions which are standard in the design and construction industry in Nebraska. The proposed terms and conditions may set forth an initial determination of the manner by which the construction manager selects any subcontractor and may require that any work subcontracted be awarded by competitive bidding;

(4) Any bonds and insurance required by law or as may be additionally required by the school district;

(5) General information about the project which will assist the school district in its selection of the construction manager, including a project statement which contains information about the scope and nature of the project, the project site, the schedule, and the estimated budget;

(6) The criteria for evaluation of proposals and the relative weight of each criterion; and

(7) A description of any other information which the school district chooses to require.

Sec. 10. (1) A school district shall evaluate proposals for a construction management at risk contract in accordance with this section.

(2) The school district shall evaluate and rank each proposal on the basis of best meeting the criteria in the request for proposals and taking into consideration the recommendation of the selection committee pursuant to section 11 of this act.

(3) The school district shall attempt to negotiate a construction management at risk contract with the highest ranked construction manager and may enter into a construction management at risk contract after negotiations. The negotiations shall include a final determination of the manner by which the construction manager selects a subcontractor. If the school district is unable to negotiate a satisfactory contract with the highest ranked construction manager, the school district may terminate negotiations with that construction manager. The school district may then undertake negotiations with the second highest ranked construction manager and may enter into a construction management at risk contract after negotiations. If the school district is unable to negotiate a satisfactory contract with the second highest ranked construction manager, the school district may undertake negotiations with the third highest ranked construction manager, if any, and may enter into a construction management at risk contract after negotiations.

(4) The school district shall file a copy of all construction management at risk contract documents with the State Department of Education within thirty days after their full execution. Within thirty days after completion of the project, the construction manager shall file a copy of all contract modifications and change orders with the department.

(5) If the school district is unable to negotiate a satisfactory contract with any of the ranked construction managers, the school district may

either revise the request for proposals and solicit new proposals or cancel the construction management at risk process under the act.

Sec. 11. (1) In evaluating proposals in accordance with sections 8 and 10 of this act, the school district shall refer the proposals for recommendation to a selection committee. The selection committee shall be a group of at least five persons designated by the school district. Members of the selection committee shall include (a) members of the school board, (b) members of the school administration or staff, (c) the performance-criteria developer when evaluating proposals from design-builders under section 8 of this act or the school's architect or engineer when evaluating proposals from construction managers under section 10 of this act, (d) any person having special expertise relevant to selection of a design-builder or construction manager under the Nebraska Schools Construction Alternatives Act, and (e) a resident of the school district other than an individual included in subdivisions (a) through (d) of this subsection. A member of the selection committee designated under subdivision (d) or (e) of this subsection shall not be employed by or have a financial or other interest in a design-builder or construction manager who has a proposal being evaluated and shall not be employed by the school district or the performance-criteria developer.

(2) The selection committee and the school district shall evaluate proposals taking into consideration the criteria enumerated in subdivisions (a) through (g) of this subsection with the maximum percentage of total points for evaluation which may be assigned to each criterion set forth following the criterion. The following criteria shall be evaluated, when applicable:

(a) The financial resources of the design-builder or construction manager to complete the project, ten percent;

(b) The ability of the proposed personnel of the design-builder or construction manager to perform, thirty percent;

(c) The character, integrity, reputation, judgment, experience, and efficiency of the design-builder or construction manager, thirty percent;

(d) The quality of performance on previous projects, thirty percent;

(e) The ability of the design-builder or construction manager to perform within the time specified, thirty percent;

(f) The previous and existing compliance of the design-builder or construction manager with laws relating to the contract, ten percent; and

(g) Such other information as may be secured having a bearing on the selection, twenty percent.

(3) The records of the selection committee in evaluating proposals and making recommendations shall be considered public records for purposes of section 84-712.01.

Sec. 12. A design-build contract and a construction management at risk contract may be conditioned upon later refinements in scope and price and may permit the school district in agreement with the design-builder or construction manager to make changes in the project without invalidating the contract. Later refinements under this section shall not exceed the scope of the project statement contained in the request for proposals pursuant to section 7 or 9 of this act.

Sec. 13. Nothing in the Nebraska Schools Construction Alternatives Act shall limit or reduce statutory or regulatory requirements regarding bonding or insurance.

Sec. 14. (1) No more than twenty-four contracts shall be executed under the Nebraska Schools Construction Alternatives Act as follows:

(a) For contracts under two million dollars, four contracts in each congressional district;

(b) For contracts of at least two million dollars but under ten million dollars, two contracts in each congressional district; and

(c) For contracts of ten million dollars or more, two contracts in each congressional district.

(2) For purposes of this section, the physical location of the project shall be considered the location of the contract for that project.

(3) The date the contract is executed shall be utilized to determine whether the limitations on contracts imposed by this section have been exceeded. A contract in excess of the limitation on contracts shall be void.

Sec. 15. (1) A school district shall not use a design-build contract or construction management at risk contract for a construction project with locations on parcels of land which are not contiguous except for specialty maintenance projects.

(2) For purposes of this section, (a) a specialty maintenance project is a construction project for the maintenance of an existing facility with a specialty contractor, such as an electrical contractor or plumbing contractor, and (b) parcels are considered contiguous if they would be contiguous but for the existence of a public road.